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No. 868

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In the Supreme Court of the United States

OCTOBER TERM, 1967

ROCCO PRANNO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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The Petitioner, Rocco Prano, pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above entitled cause, dated September 27, 1967, affirmed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. The opinion of the Court of Appeals (not yet printed) is reprinted as Appendix A, *infra.*

A Petition for Rehearing was timely filed but was denied by order dated November 3, 1967, which order is reprinted as Appendix B, *infra.*

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, entered on September 27, 1967, affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division. On November 3, 1967, Petition of Rehearing was denied. This Petition for a Writ of Certiorari is filed within thirty days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The proof failed to support the charges of the indictment.

2. The Court erred in allowing testimony as to the products manufactured and distribution by the International Paper Company in interstate commerce.

3. The facts in the record do not show a violation of the Hobbs Act.

4. The Court erred in permitting conversations between Defendant Seidler and rebuttal witness, to be binding on the Appellant.

A. The Court enlarged on the error by making a prejudicial comment on the testimony before the jury.

STATEMENT OF THE CASE.

A. Nature of the Case and Its Disposition.

This is an appeal from a judgment of conviction on Count One of a two count indictment. The second count was dismissed. Count One charged violations of Section 1951 of Title 18 United States Code. On Count One appellants Pete Anderson and Rocco Pranno were charged together with co-defendants Henry Ed Neri and Wayne Seidler.

The case was tried before a jury. Henry Ed Neri was acquitted by the Court at the close of the Government's case. The jury returned verdicts of guilty on said Count One as to Pete Anderson, Rocco Pranno and Wayne Seidler, upon which judgments and convictions were ordered and sentence imposed, from which convictions and sentences this appeal is taken by Pete Anderson and Rocco Pranno, appellants.

Pete Anderson was sentenced to the custody of the Attorney General for a period of three years under the provisions of Section 4208(a)(2), Title 18, United States Code.

Rocco Pranno was sentenced to the custody of the Attorney General for a period of fifteen years.

Statement of Facts.

This cause was commenced by the filing of an indictment, charging that between October 1, 1960 and November 15, 1960, these defendants and others did obstruct, delay and affect commerce, and the construction of the building at 635 North Northwest Avenue, Northlake, Illinois, and movement of materials, supplies, and other commodities required for the construction of said building in commerce, and to attempt to do so by extortion in that they would attempt to obtain property to the value of $20,000.00 and did obtain property to the value of $16,000.00, in the form of money from the Perini Corporation and International Paper Company with their consent, induced by the wrongful use of fear in that they would threaten the Perini Corporation and International Paper Company, that the building permit of the City of Northlake, Illinois, authorizing the construction of said building would not be issued unless and until the Perini Corporation and International Paper Company paid the said money to the said defendants and co-conspirators.

The defendants, at the close of the Government's case, made their Motion for Judgment of Acquittal, which Motion was denied. They renewed their Motion for Judgment of Acquittal or, in the alternative for a new trial, which was denied. (A. 29). Judgments were entered on the verdicts and sentences imposed as stated heretofore. (A. 7). The defendants filed their Notice of Appeal to this Court. (A. 5).

The Evidence.

Prior to October 1, 1960, the International Paper Company purchased land for $380,000.00, and started filling the land and grading it in June 1960, so that they could

construct a building, the intended use of the building was to fabricate corrugated shipping containers for craft paper. The general contract was awarded to Perini Corporation verbally on October 20, 1960. The value of the contract was two million dollars. Under the contract documents the contractor was to obtain all permits. (A. 17). The contract was signed in December 1960. (A. 20).

Marshall Olson, was a construction superintendent for the Perini Corporation, and first reported to the Northlake project in the middle of October 1960. Started the fill and broke ground the last week of October. Equipment and shanties were moved on the job around the 20th or 21st of October. (A. 12).

On October 21, 1960, Marshall Olson and Mr. Tonking, who was resident engineer for the International Paper Company, went to the Northlake City Hall with plans and specifications for approval to obtain a building permit. Pete Anderson, the building commissioner, was not there. They left the plans with the girl. That afternoon Pete Anderson came to the building site and said, "I will issue the building permit. It has to be reviewed by an engineering firm in accordance with the City Ordinance. Anderson gave Olson a building application. (A. 11).

On October 25, 1960, Olson and Tonking went to the Village Hall and met Alderman Seidler and Anderson. Seidler said that the building permit could not be issued until after the approval was made by the DeSoto McCabe engineering firm, who would review the drawings, and as to the engineering fee that would be stated by the engineering firm. (A. 11). Olson, as an engineer, knew that because of the voluminous plans concerned checking by a consulting engineer would take some time. It gave him something to think about—he knew there would be a delay. Olson

had a conference to see if the permit could be hurried up. He called Pete Anderson. On the application for the permit he did not fill in the names of the separate contractors, in regard to them, he wrote "To be let later. Will advise after award of contract." The subcontracts were not let, because it takes weeks to award contracts of that sort. (A. 15).

On October 26, 1960, a meeting took place at the Key Club. Present were Anderson, Seidler, DeSoto, McCabe and Ben Tonking. Olson asked McCabe his qualifications and what was the fee. McCabe stated it would be one per cent of the total contract, $20,000.00, and that before a building permit could be issued they had to go through an inspection by his company. Olson said he would consult with Martin Sagal, vice president of the Building Division of the Perini Corporation. (A. 11).

Nester A. Anderson, an engineer with the International Paper Company on November 1, 1960, met with McCabe in the presence of his company's attorneys, Mr. Myneder and Mr. Tonking, at the Key Club. McCabe stated he was a consulting engineer for the City of Northlake, and was to review the plans and specifications. As it was necessary prior to the award of the building permit. Anderson acknowledged the City's right to review but took exception to the checking fee of $20,000.00. Anderson told McCabe he considered the figure high, to reconsider and call him. (A. 17).

Charles Myneder stated, that as attorney for the International Paper Company, he came to Northlake and his purpose was to get a reduction in the plan review fee and cut the price down, and made no other objection to the payment of Mr. McCabe's review fee. He attended as attorney for the International, was to see that the Company acted legally. (A. 21).

Perini Company submitted a bid about the middle of September 1960, on an International Paper plant in Northlake, Illinois. Orally they were informed that they had the job.

On November 10, 1960, Mark Sagal, vice-president and manager of the Building Construction Division of the Perini Company, went to the Key Club, met one who introduced himself as Mr. Martell, who said that McCabe was in Florida and is his partner. Martell took him to a table, there was Seidler, Pete Anderson and Provenzano, the chief of police. (A. 24). Sagal told them he wanted to talk about Mr. McCabe's fee, he told them that the International Paper Company was thinking of giving up the plan. He told them they ought to consider the size of the fee and see if it was possible to reduce it. Seidler told him they were going to reduce it to $16,000.00, and he thought it was a fair amount for reviewing the plans. Sagal called Seidler and told him that International Paper agreed to pay $16,000.00. Had funds wired to bank in Northlake, so fee could be paid. Called Olson and gave him instructions what to do Monday. (A. 25).

On November 14, 1960, Olson received a call from Sagal. Bill Till and Olson made out a check to DeSoto McCabe engineering firm. Went to Key Club and saw McCabe and Seidler and gave check to McCabe, who gave him a receipt. (A. 12).

DeSoto B. McCabe, Jr. a civil engineer, in late September, had a conversation at the Key Club with Rocco Pranno, who said that he had a big set of plans coming up in Northlake, and he should look them over, and that we could all make a buck. McCabe said perhaps Northlake could appoint him as their consulting engineer to review the plans. Jimmy asked if McCabe could make the job so expensive that the guys would have to go along with it. (A. 28).

About two weeks later McCabe, Seidler, Joe Drodz, an alderman, Pete Anderson and Jim Martell were present at the Key Club. McCabe told them the kind of engineering review he thought the City of Northlake could require before they issued a building permit, storm drainage review, traffic ingress, egress, water supply, fire fighting equipment, getting in and out. (A. 28). Seidler asked him to review the plans when they were received by Northlake, and McCabe said he would review the plans if he had a letter of authorization from Northlake. Seidler said he would get the letter, because they controlled the issuance of permits in Northlake. Pete Anderson said he would not issue a permit without the approval of the building committee and would tell International Paper Company that he would not issue a permit without the engineering report. McCabe was given the plans by Pete Anderson. McCabe made a review of the plat work, the roofing, parking area, storage, drainage, sanitary layouts, how the traffic would get in and out. (A. 29).

Two days later Jimmy asked McCabe how much the charge could be for the review, and McCabe said one per cent would be $20,000.00. Jimmy said McCabe would get twenty-five per cent of the amount and he would keep the rest to take care of the boys. (A. 29).

On October 26, at the Key Club there was present Marshall Olson, Ben Tonking, Seidler, Pete Anderson, Jimmy Martell and McCabe. McCabe told Olson and Tonking that the engineering review fee would be 1 per cent of his estimated cost of the project, $20,000.00. Olson and Tonking both said they would have to refer the matter back to their home offices. McCabe said that if engineering fee was not paid that Northlake would not issue the building permit. (A. 30).

On November 1, 1960, McCabe met N. A. Anderson and a Mr. Myneder at the Club. McCabe told them that the engineering review fee was $20,000.00, and if not paid the City of Northlake would not issue the permit, because he is the consulting engineer for Northlake and would not approve of the plans, he would cause them about six months delay in the issuance of the permit, and he would recommend to the City of Northlake that a storm water basin be constructed on this property, and that he knew that there wasn't room enough on the property to allow them to build one. (A. 30). And that if they didn't pay this it would lead to a total rejection by Northlake. (A. 31).

Two or three days later McCabe met Martell and Seidler at the Club. Jimmy said International was fighting the amount of the fee, that the amount would have to be reduced. Seidler said $16,000.00 was as low as the fee ought to be. Jimmy told McCabe to go ahead and give Pete Anderson a bill for $16,000.00. McCabe gave his engineering report on the plans. (A. 31).

On the 4th or 5th of November, McCabe gave his report on the review and his bill for $16,000.00 to the Perini Company. (A. 31).

On November 12, 1960, Jimmy told McCabe he had a meeting with the guys and the deal was set and the $16,000.00 check would be delivered to the Key Club on November 14. (A. 31).

On November 14, at the Key Club were Seidler, Martell and McCabe. Marshall Olson came in and gave McCabe a check for $16,000.00. McCabe went to the bank with Jimmy's brother Al Pranno and cashed the check. Went

back to Key Club and gave Jimmy $16,000.00 in cash, and Jimmy gave McCabe $4,000.00 and McCabe left. (A. 31).

McCabe, when he talked to the gentlemen on November 1st, said it was true that he could recommend a storm water-holding basin. (A. 33).

Evidence For the Defendants.

Wayne A. Seidler stated that McCabe told him that he would reduce his fee to $16,000.00 and send a bill for $16,000.00. Sagal called him and told him $16,000.00 was agreed on. The ordinance required eight signatures of the City Council to approve a building permit. (A. 34). The permit was signed between October 25 and November 14. The fee had nothing to do with his signing it. (A. 34).

Pete Anderson stated that he was never present when McCabe told them his fee would be 1 per cent. Saw Sagal at Key Club and they were discussing baseball. He did not participate in the conversation. When he left they were still there. He never had authority to issue a building permit. It had to be signed by the Aldermen and Building Committee. He never conspired with anybody to obtain $20,000.00, and to receive a portion of $16,000.00, or obstruct or delay Interstate Commerce. Prior to the time the permit was issued a lot of work had been done. They filled for five months before they asked for a building permit. The site was 8 feet below road level. That's why they filled it in. They had trucks hauling in dirt and large machinery moving in leveling it out. They had no permit and the ordinances require them to have a permit. (A. 36).

Rebuttal For the Government.

Robert James Eppley in rebuttal stated that he was appointed city manager of Northlake, Illinois November 1, 1960. On November 5, 1960, he had a conversation with Mr. Seidler who asked him what he intended to do about certain things in the city that he had observed and was changing. Seidler told him that he collected money from various people having business with the city and what Eppley wanted if anything.

Eppley told Seidler that he was going to call the shots as he saw them and he had no choice, but to do this in his job, and that his salary of $1,000.00 a month was adequate.

Seidler told him that he had a need for approximately $5,000.00 a year, that he made a good salary in his present job, but that he had a need for additional funds and that to make this money, if the witness was going to upset things that he intended to run for the job, the paid job of City Clerk of Northlake. (A. 38).

REASONS FOR GRANTING THE WRIT

THE PROOF FAILED TO SUPPORT THE CHARGES OF THE INDICTMENT.

Section 1951, Title 18, United States Code known as the Hobbs Act proscribes the obstruction, delay or affecting of interstate commerce or the movement of any article or commodity in interstate commerce. The indictment charges that beginning on or about October 1, 1960, and continuing to on or about November 15, 1960, the appellants with others conspired to obstruct, delay and affect commerce, and the construction of the building at 635 North Northwest Avenue, Northlake, Illinois, and movement of materials, supplies, and other commodities for the construction of said building in commerce, and to attempt to do so by extortion.

There are two essential elements of a Hobbs Act crime: interference with commerce, and extortion, *Stirone* v. *United States*, 361 U.S. 212, 218.

Interference with commerce gives the Federal Courts jurisdiction.

It is our submission that there was insufficient evidence to prove that commerce or the movement of any article or commodity in interstate commerce for the intended new construction of a building between October 1, 1960 and November 15, 1960.

The Government had the burden to prove that commerce was obstructed or delayed in the construction of the building between October 1, 1960 and November 15, 1960.

In the proof of this element Marshall W. Olson stated that cement and steel came from Indiana and steel and glass from Pittsburgh. (A. 10, Tr. 90).

Sidney Berger, president of the Berger Steel Company, located in Lafayette, Indiana, stated that they supplied long span steel joists that were used in the construction of the International Paper plant at Northlake, Illinois. Shipping started in December, 1960 to March of 1961. (A. 23).

Mr. Olson did not testify as to when or on what date the cement, steel and glass was shipped to or received at the Northlake site. He did state that on October 21, 1960, when he went to the City Hall with plans and specifications (A. 11), the material had not been ordered. That there are books and records and invoices showing when all of these materials were ordered in the office of the Perini Corporation.

The Government failed to offer any definite proof under the allegation in the indictment, that commerce was effected or delayed between October 1, 1960 and November 15, 1960.

The Government failed to introduce any evidence, as to records of the Perini Corporation, that materials, supplies, and other commodities required for the construction of the building were in interstate commerce between October 1, 1960 to November 15, 1960.

THE COURT ERRED IN ALLOWING TESTIMONY AS TO THE PRODUCTS MANUFACTURED AND DISTRIBUTION BY THE INTERNATIONAL PAPER COMPANY IN INTERSTATE COMMERCE.

The Court erred in allowing Paul Beirich, the plant accountant for the International Paper Company, to testify that since the plant opened in October, 1961, corrugated shipping containers and a specialty item called a grain door were manufactured. Those products were shipped into Illinois, Indiana, Michigan and Iowa. (A. 21).

An objection was made on the ground that the conspiracy charged here is to "obstruct, delay and affect commerce," as that term is defined in Title 18, "one object," and the "construction of a building at Northlake," another object, "and the movement of materials, supplies, and commodities required for the construction of that building." Objection was overruled. (A. 22).

Evidently the theory of the Government in introducing the said testimony was to show the jury, the prospective use of the building, between October 1, 1960, to November 15, 1960, was to manufacture products and distribute them in interstate commerce.

The appellants were not charged in the indictment of obstructing or delaying the manufacturing of products that were to be distributed in interstate commerce.

The Hobbs Act prohibits the obstruction of interstate commerce by means of extortion. Since the States can care for extortion, obstruction of commerce is the essence of the Federal offense. We say that a conviction could not constitutionally be predicated upon an obstruction

which was not charged in the indictment. What the trial judge did was permit appellants to be tried on a charge for which they were never indicted.

The United States Supreme Court in reversing *United States* v. *Stirone,* 262 F.2d 571, stated in 361 U.S. 214, 217:

> "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States* v. *Norris,* 281 U.S. 619, 622, 50 S.Ct. 424, 425, 74 L.Ed. 1076, *Cf. Clyatt* v. *United States,* 197 U.S. 207, 219, 220, 25 S.Ct. 429, 431, 432, 49 L.Ed. 726. Yet the court did not permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Reder's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless or innocuous. Compare *Ford* v. *United States,* 273 U.S. 593, 602, 47 S.Ct. 531, 534, 71 L.Ed. 793; *Goto* v. *Lane,* 265 U.S. 393, 402, 44 S.Ct. 525, 527, 68 L.Ed. 1070. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment

returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

"Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime; interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the *Bain* case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal

error. *Cf. Cole* v. *State of Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; *DeJonge* v. *State of Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278."

Because of the lack of evidence of interference with commerce between October 1, 1960 and November 15, 1960 the appellants could have only been convicted by the jury on their consideration of the incompetent evidence of the type, which *Stirone* case calls fatal error.

THE FACTS IN THE RECORD DO NOT SHOW A VIOLATION OF THE HOBBS ACT.

It is our contention that the facts in the record do not show a violation of the Hobbs Act nor does the record disclose any delay. If a crime was committed it was between the givers and takers of a bribe, under the laws of the State of Illinois.

The International Paper Company started to fill the site in June 1960. Lendth did the work. (A. 17) They had been filling the site that was 8 feet below road level. They had trucks hauling in dirt and large machinery leveling it out. They had no permit and the ordinances required them to have one. (A. 36)

On October 25, 1960, Marshall Olson, construction superintendent for the Perini Corporation went to the Northlake City Hall with plans and specifications for approval to obtain a permit. The specs were several hundred pages. (A. 11).

The general contract was awarded to the Perini Corporation by Nester A. Anderson on October 20, 1960. (A. 17). The contract was signed in December 1960, the contract documents which were part of that contract, called for the contractor to obtain all permits and licenses. (A. 20).

Perini Corporation started the fill and broke ground, the last week in October. Equipment and shanties were moved on the job around October 21. (A. 12). Steam shovels, excavating equipment, caterpillar tractors, machinery for sinking caissons were on the job in November, not later than the middle of the month. The contractor for the caisson work was Case Foundation. They began in November, after the caissons went in, the Perini Corporation had to step in with their organization. (A. 13).

At the time Olson applied for a permit there was no equipment from Perini Corporation on the job. (A. 14).

Mr. Nester A. Anderson testified over objection, that there was a delay of three or four weeks.

The Court at that time stated:

> "Yes, if you relate the delay to the building permit I certainly sustain the objection. Then you are going to have to bring out all of the facts and let the jury determine whether the delay was due to the building permit or something else. But existence of a delay I have allowed him to testify to."

There are not any facts in the record showing a delay, yet the record does show continual work at the site. Mr. Olson stated that Case Foundation put in the caissons in November. Then the Perini Corporation stepped in. The record is void as to when Case Foundation began their work. We must assume that they completed all their work before Perini Corporation could begin to construct the building. There is no evidence that Case Foundation was delayed in their caisson work.

On October 25th when Olson made application for the permit, the sub-contractors were not known, he stated it takes weeks to award contracts.

The reason why there was no delay was because International Paper and Perini Corporation were negotiating with McCabe as to a reasonable reviewing fee. McCabe said that the fee was 1 per cent of the cost, $20,000. Perini Corporation and International wanted it reduced. Perini Corporation wanted the permit in a hurry, and knew naturally that if a consulting engineer were to review the plans there would be a delay. (A. 15).

Olson applied for a permit on October 25, 1960, and was told it had to be reviewed by a consulting engineer. On the next day Olson was interested in what the reviewing fee would be. He knew that a review of 200 pages of specs could not be completed in one day. After he was told that the fee was 1 per cent of the cost or $20,000, he said he would consult his home office.

Nester A. Anderson on November 1, 1960 with the Company attorney Mr. Myneder was told by McCabe that he was to review the plans and was a professional man and had the right to establish the value of his services. McCabe said that he was interested in site work, parking, traffic patterns and water drainage. (A. 17). McCabe gave one illustration, that would require a drainage basin be installed on the land to collect drain water. McCabe happened to know that International Paper Company did not have room for that kind of basin. They were at logger heads on the amount of the fee. McCabe said he would reconsider it and let them know, if it could be reduced. (A. 21).

International Paper knew it was dealing with City Hall. They had knowledge that their plans and specs must conform with the City Ordinances. They knew the permit had to be signed by the Alderman of Northlake. Interna-

tional Paper and Perini Corporation also knew that their plans did not comply with the ordinances, as to a storm water-holding basin. McCabe in testifying on cross-examination said, that when he talked to the gentlemen on November 1, *it was true* he could recommend a storm water-holding basin.

The compromise review fee was a bribe by Perini Corporation and International Paper to obtain a favorable report from the consulting engineer, so that the permit could be approved by the City Council.

They paid the bribe, so that they would not have to erect a storm water-holding basin.

Under the Illinois Criminal Code, Illinois Revised Statutes 1961, Chapter 38, Sec. 78, the officers of the Perini Corporation and International Paper Company were guilty of bribery. Under that Act, both the giver and taker are guilty.

In *United States* v. *Kubacki*, 237 F. Supp. 638, 641 (1965), the Court said:

> "In all the extortion cases cited by the government, the victim was compelled to pay for the exercise or enjoyment of a right or privilege already his, under threat and out of fear that if he did not comply with the demands he would be subject to unwarranted interference, with resulting substantial harm to his business or property rights." * * * The court in the *Dioguardi* noted the distinction between bribery and extortion, the essence of the one being the voluntary giving of something of value to influence the performance of official duty, the essence of the other duress. Applying that distinction to this case, the record is devoid of evidence of duress."

The Perini Corporation and International Paper Company never complained to any official body that they paid a bribe under duress. The story first came to the attention of special agent Walsh, when Walsh was checking McCabe on his 1960 income tax return.

In a vigorous dissent in *United States* v. *Stirone,* Judge Hastie, said at pages 262 F.2d at 578 and 580:

> "Finally, it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. See *Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion,* 1948, 13 LAW AND CONTEMPORARY PROBLEMS, 64, 70. We should insist that federal jurisdiction be clear before imposing federal sanctions in an area of primarily local concern. Federal jurisdiction is certainly far from clear in the circumstances we are now considering."

THE COURT ERRED IN PERMITTING CONVERSATION BETWEEN DEFENDANT SEIDLER AND REBUTTAL WITNESS, TO BE BINDING ON THE APPELLANTS.

The Court permitted Robert Eppley in testifying in rebuttal, that he was the City Manager of Northlake, Illinois. That on November 5, 1960, he had a conversation with Mr. Seidler, a co-defendant. Mr. Seidler asked Eppley

what he intended to do about certain things in the City that Eppley had observed and was changing. Seidler told him that Seidler collected money from various people having business with the City, and what did Eppley want, if anything. Seidler told Eppley that he had a need for approximately $5,000 a year in money, that he had a need for additional funds and that to make this money if Eppley was going to upset things that he intended to run for the job, the paid job of City Clerk of Northlake. (A. 38).

The Court admitted this testimony against the Appellant. This testimony was not in furtherance of the object of the conspiracy, as alleged in the indictment.

Our Supreme Court stated in *Lutwak* v. *United States,* 344 U.S. 605, 617:

> "Declarations stand on a different footing. Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party. *Clune* v. *United States,* 159 U.S. 590, 593. See *United States* v. *Gooding,* 12 Wheat, 460, 468-470. But such declaration can be used against the co-conspirator only when made in furtherance of the conspiracy. *Fiswick* v. *United States,* 329 U.S. 211, 217; *Logan* v. *United States,* 144 U.S. 263, 308-309."

A.

The Court Enlarged on the Error by Making a Prejudicial Comment on the Testimony before The Jury.

After Mr. Eppley testified as to the conversation with Mr. Seidler, he was asked a question and made this answer:

> A. I made application for employment elsewhere.
> The Court: Very good.

The comment of the Court was prejudicial to the Appellants. The comment could only be understood by the jurors, that the Court believed in the credibility of the witness. That the Court commended the witness for leaving the position, as City Manager in Northlake and getting away from corrupted aldermen like Seidler. The remark indicated to the jury that the conversation between the witness Eppley and Seidler convinced the Court that Seidler and Appellants were corrupt.

This Honorable Court stated in *United States* v. *Carmel*, 267 F.2d 345, 349 (7 Cir., 1959):

> "We recently said in *United States* v. *Scott*, 7 Cir., 257 F.2d 374, 377: 'The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *United States*, 1894, 153 U.S. 614, 626, and he should not say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. *United States* v. *Levi*, 7 Cir. 1949, 177 F.2d 833. It is the duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impartiality. *United States* v. *Wheeler*, 7 Cir. 1955, 219 F.2d 773, * * *,"

We submit this matter was a subject for prosecution by local authorities. The International Paper Company and Perini Corporation did not have an unqualified right to a building permit. Their right to a permit was subject to a review by a consultant engineer under the ordinance, and the plans and specs were to conform with the City ordinances, and then approved by a legislative body. International Paper Company and Perini Corporation knew the procedure provided for the issuance of permits, but instead, to gain favor they bribed City officials for their own gain.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

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